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306-805—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1347

B. L. SUHL AND MARGARET WIERMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–21) is reported at 390 F. 2d 547.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1968, and a petition for a rehearing was denied on March 18, 1968. On April 22, 1968, Mr. Justice Douglas extended petitioners' time for filing a petition for a writ of certiorari until April 27, 1968.[1] The petition was filed on April 20, 1968. The

[1] The application for the extension was filed on April 20, 1968, three days after the time for petitioning for certiorari had expired under Rule 22(2) of the Rules of this Court. Notwithstanding the requirement of Rule 34(2) that the applica-

jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence against petitioner Wierman was sufficient to justify submission of her case to the jury.

2. Whether proof of a transaction alleged to have been an overt act in the conspiracy, and similar in character to the transactions involved in the principal charges, was material.

3. Whether it was proper cross-examination on the issues of motive and intent for the government to ask petitioners about the truthfulness of findings of fact made by the referee in bankruptcy in a related civil proceeding.

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tion be filed within the period sought to be extended, we raise no question as to the timeliness of the petition. We do not regard the 30-day period for petitioning for certiorari in a criminal case as a jurisdictional limit, compare our Memorandum in Opposition in *Morales et al. v. I.N.S.*, Nos. 1555, 1556 Misc., and we recognize the existence of special circumstances in this case which warrant exception to the Court's Rules. It appears that the Clerk received the petition on April 15, within the normal 30-day period allowed by Rule 22(2), but did not file it at that time because the certified record, which under the Rule must accompany the petition, had not been received. Counsel for petitioners had asked the clerk of the court of appeals three weeks earlier to transmit the record, but through an oversight in the clerk's office it had not been prepared. When the Clerk of this Court informed counsel, on April 18, that the record had not been received, the oversight was discovered and the record was promptly certified and transmitted. It arrived on April 20 (the same day on which the application for an extension was filed) and the petition was thereupon docketed.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioners were convicted on all counts of a six-count indictment charging them with using the mails to defraud (counts 1–4), conspiring so to do (count 6), and misapplying funds of a federally insured bank (count 5), in violation of 18 U.S.C. 1341, 371, and 656, respectively (1 R. 2–11, 54–55). On November 1, 1965, petitioner Suhl was sentenced to five years' imprisonment on each of counts 1–5, to run concurrently, and to five years on count 6, to run consecutively to the sentence on the other counts. Petitioner Wierman, on the same date, was sentenced to concurrent five-year terms on all six counts.[2] The court of appeals affirmed (Pet. App. 1–21).

The substantive mail fraud counts (1–4) charged two substantially identical "check kite" schemes, whereby "false credit would be obtained by exchange and passing of worthless checks between two banks" (1 R. 2, 6). The banks involved in both schemes, to which petitioners were common parties, were a Los Angeles branch of the Bank of America and the Frontier Bank of Covelo, California. Covelo is a small country town in a remote section of northern Califor-

[2] Pursuant to 18 U.S.C. 4208(a)(2), the court directed that Suhl become eligible for parole at such time as the Board of Parole deemed appropriate (1 R. 78). In accordance with 18 U.S.C. 4208 (b) and (c), the Wierman sentence was by its terms made subject to possible later modification on the basis of a study which the court ordered made of factors which might be deemed relevant to the imposition of a more appropriate penalty (1 R. 79).

nia, several hundred miles from Los Angeles—a fact which, as noted by the court of appeals, contributed substantially to the success of the schemes (Pet. App. 3–4). Petitioner Wierman (the mother of petitioner Suhl) was the president of the Covelo bank during the relevant period and, with Suhl, owned all but a small fraction of its stock (2 R. 203). The two schemes also involved, in addition to petitioners, a codefendant named Ronald Vaughn (counts 1 and 2), who was found guilty on both counts and did not appeal,[3] and a codefendant named Richard Gibson (counts 3 and 4), who testified for the government following dismissal of the indictment as to him (4 R. 556–593).

The scheme charged in counts 1 and 2 was that petitioner Suhl drew checks on his account in the Los Angeles bank for deposit by Vaughn in Vaughn's account with the Covelo bank, at times when Suhl's account contained insufficient funds to cover them; and, correspondingly, checks were drawn by Vaughn on his Covelo account and deposited by Suhl in his Los Angeles account at times when Vaughn's account lacked adequate covering funds, all of which was known to the participants. The scheme contemplated the utilization by these two defendants of "the span of time involved in the normal passage of mails" between the two distant localities in order to "accomplish delay in the posting of checks to the * * * respective accounts" (1 R. 3). The resulting delay gave Suhl, who was, by his own testimony, financially em-

[3] Vaughn was also convicted on counts 5 and 6, charging conspiracy and aiding the misuse of funds of a federally insured bank (1 R. 53).

barrassed at the time, the use of artificially generated cash (Pet. App. 5).

The specific charge of count 1 was that on November 13, 1963, at a time when Vaughn's Covelo account contained less than $600, Suhl deposited a $55,000 check of Vaughn's in Suhl's Los Angeles account, thereby causing the Los Angeles bank to send the check by mail to Covelo for collection. Vaughn and petitioner Wierman were charged as aiders and abettors of this transaction (1 R. 4). Count 2 charged that Mrs. Wierman, on November 18, 1963, at a time when Suhl's Los Angeles account contained less than $200, deposited a $55,000 check of Suhl's in Vaughn's Covelo account, causing the check to be mailed to Los Angeles. Vaughn and Suhl were charged as aiders and abettors (1 R. 4–5).

Counts 3 and 4 were similar to counts 1 and 2, except that they involved Gibson rather than Vaughn as the third party to the transactions and two different kited checks, each in the amount of $50,000 (1 R. 5–8).

Count 5 charged that Mrs. Wierman, over a three-month period commencing in September 1963, as president of the Covelo bank, misapplied banks funds by causing a series of Suhl's checks drawn on his Los Angeles account, ranging in amount from $46,000 to $125,000 and aggregating $585,000, to be credited to Vaughn's Covelo account, knowing that Suhl's account lacked sufficient covering funds, and authorizing corresponding withdrawals from Vaughn's account with knowledge of the account's insufficiency. Vaughn

and Suhl were charged as aiders and abettors (1 R. 8–10).

Count 6 charged that all four defendants conspired to commit mail fraud offenses of the sort charged in the four substantive mail fraud counts (1 R. 10–11).

The evidence, which was voluminous and is stated in more detail in the opinion of the court of appeals (at Pet. App. 3–11), showed, in brief, that in late 1963 Suhl, who claimed a net worth of $800,000, was in danger of sustaining heavy financial losses because of the decline in price of a large block of stock he owned. To obtain funds to support its price by making additional purchases of the stock, he undertook to borrow from every possible source and was negotiating to sell the Frontier Bank and two money order companies which he and his mother completely or substantially owned. When his account at the Los Angeles branch of the Bank of America became overdrawn, the first of the two kiting schemes described in the indictment took form. Vaughn, in Los Angeles, and at Suhl's request, wrote several checks on Vaughn's account at the Frontier Bank, payable to Suhl, even though that account contained insufficient funds to cover the checks. Suhl immediately deposited the checks in his account at the Bank of America and used the money in his stock market activities. When each of Vaughn's checks arrived at the Frontier Bank, it was brought to the attention of the cashier, Robert Goodwin, a government witness and acknowledged accomplice in the kiting activities. A check drawn on Suhl's account at the Bank of America, payable to Vaughn, was in each case then prepared at Covelo and deposited in

Vaughn's account, and Vaughn's check to Suhl honored. In at least three instances, the Vaughn check to Suhl was held in the "rejected check register" for one to three days before payment. Suhl's checks to Vaughn were then sent to the Bank of America, where, with the exception of the last check, they were paid upon receipt (Pet. App. 4–5). The Suhl-Gibson transactions, while differing in details (described in the court of appeals' opinion), were basically the same as the Suhl-Vaughn exchanges in purpose and mode of execution (Pet. App. 5–6). Goodwin testified that in all of his activities by which he assisted and made possible the kiting he was acting at the express instructions of Mrs. Wierman as well as of Suhl (Pet. App. 7–8).

ARGUMENT

1. Petitioner Wierman contends that her conviction cannot stand because government witness Goodwin, who, she says, was the only witness who in any way implicated her in the fraudulent schemes, was shown on the record to have perjured himself (Pet. 20–30; Pet. App. 87–92). As the careful review of the evidence by the court below shows (Pet. App. 7–11), the claim is unsound. While defense counsel's searching cross-examination disclosed several inconsistencies and internal contradictions in the testimony regarding the *details* of Mrs. Wierman's involvement, the central substance of Goodwin's testimony—that Mrs. Wierman was aware of and indeed took an active part in the kiting activities—was never retracted or shown be be patently false (Pet. App. 10). Therefore, as the court pointed out, the jury was entitled to believe him,

or to believe enough of his testimony to convict, notwithstanding his evident confusion and uncertainty as to certain of the details of her participation (Pet. App. 10). The significance of the witness's motives, inconsistencies, and contradictions is, of course, uniquely a jury question. Here the jury was instructed that the testimony of an accomplice is "to be received with caution and weighed with great care" (7 R. 1281) and was further instructed concerning the use of prior inconsistent statements for impeachment purposes (7 R. 1278, 1282). A standard instruction regarding the credibility of witnesses was also given (7 R. 1276–1278). The jury's resolution of credibility after these instructions was properly respected by the courts below.[4]

Goodwin, moreover, was not the only witness who implicated Mrs. Wierman. Significant corroborative testimony was given by government witness Tom Luther, a bookkeeper at the Covelo bank (2 R. 135), who testified that he had once seen, in a drawer of a desk to which only Mrs. Wierman had access, a pad of Bank of America checks, otherwise blank, bearing Suhl's signature (2 R. 139–141).[5] According to Good-

[4] Petitioners' allegation that the government knowingly used false evidence (Pet. 11, Q. 1; Pet. App. 87–92) is apparently premised on the existence of inconsistencies in Goodwin's testimony. We question whether his faulty recollection on matters of detail can by any appraisal be regarded as showing his testimony to be "false", but whatever inaccuracies existed were corrected upon cross-examination.

[5] The testimony of Luther's (2 R. 136, 138–139) that was stricken (4 R. 545–546), to which petitioners refer at Pet. 28, did not relate to this incident.

Petitioners' assertion (Pet. 28) that the checks which Luther saw in Mrs. Wierman's desk bore Vaughn's signature as well as

win, one of the ways in which the Suhl-Vaughn kiting activities were carried out was through the use of blank checks, pre-signed by Suhl, which Mrs. Wierman gave to Goodwin to fill out with appropriate dates and amounts, for deposit to Vaughn's account to cover Vaughn's checks to Suhl (2 R. 209–212).

2. Petitioners also challenge (Pet. 19–20; Pet. App. 96) the government's introduction of evidence of a transaction between Suhl and an acquaintance named Harold Yates, not directly connected with either the Suhl-Vaughn or Suhl-Gibson dealings. The government was permitted to show the following:

Yates owned a large block of stock, on margin, in the same company in which Suhl also had a large speculative interest. With the objective of forcing short sellers to buy in and thus bolster the price of the stock, Suhl suggested to Yates that he clear his margin account and demand delivery of his shares. Because Yates had insufficient funds to do this, Suhl suggested that he execute a money order for the necessary amount, drawn on one of the Suhl companies, and pay for it with the proceeds of a loan from the Frontier Bank which Suhl suggested Yates apply for, using the stock as collateral. Yates executed the money order, filled out an application for a loan at the Frontier Bank, signed a signature card for a checking account at the bank, and "paid" Suhl with a check drawn on the anticipated but as yet non-existent

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Suhl's is not supported by the record. At the record reference cited (2 R. 145, line 10), Luther testified that he had once seen Goodwin fill in the amount on a check bearing Suhl's and Vaughn's signatures, but the witness did not relate that check to those that he had seen in the desk.

account. Suhl promptly deposited Yates' check in his own account at the Bank of America. Because Yates lived outside the "loan area" of the Frontier Bank, his loan application was never approved. When Yates' check was presented for payment, it was held in the rejected check register at the Frontier Bank until Suhl wired covering funds to the bank, when it was paid. Suhl later secured a loan for Yates at another bank, with the proceeds of which Yates reimbursed Suhl for the funds which Suhl had wired to Covelo to honor Yates' no-account check (4 R. 595–606, 609–610, 612–616; Pet. App. 6–7).

The court of appeals correctly held that this evidence was admissible (Pet. App. 11). As the court noted, the transaction was but another illustration of how Suhl used the delay incident to the transfer of checks by mail to create an artificial cash fund for his operations. This transaction was, properly, one of the overt acts charged in the conspiracy count (1 R. 10–11). Even if we assumed *arguendo* that the transaction was not strictly in furtherance of the conspiracy, it was relevant to the intent and purpose of the defendants in engaging in the conspiracy—*i.e.*, to enable Suhl to obtain temporary use of funds for his attempt to prevent the price of his stock from falling. See, *e.g.*, *United States* v. *Marchisio*, 344 F. 2d 653, 667 (C.A. 2).

3. Petitioners also claim that government counsel was improperly permitted to cross-examine them concerning the truthfulness of certain findings of fact made by the referee in a then pending bankruptcy proceeding involving one of their money order com-

panies (Pet. App. 95).[4] The substance of this contention was considered extensively by the court of appeals and rejected (Pet. App. 13-20). Petitioners relate none of the background facts and make no real effort to show that the court's relevant holding was erroneous. Extended discussion of the point therefore appears unnecessary. It is sufficient for present purposes to stress, as the opinion below points out, that the affairs of the money order companies, both of which had trust accounts in the Frontier Bank, were germane to the issues at trial, particularly to Suhl's defense of lack of criminal intent and Mrs. Wierman's defense of lack of knowledge of any of the improprieties that were going on over a period of months in the bank of which she was president.[5] The referee's findings were not introduced in evidence, but were merely marked for identification in connection with cross-examination; there is no support in the record for the claim that the jury was improperly exposed to the official nature of the document. Furthermore,

[4] The bankruptcy proceeding is the subject of *Suhl* v. *Bumb*, 348 F. 2d 869 (C.A. 9), certiorari denied, 382 U.S. 938. A decision by the referee that petitioners were substantially indebted to the debtor company and that the trustee in bankruptcy was entitled to a turnover order against them in the amount of the debt had been affirmed by the district court prior to the trial below. In the cited decision, rendered after the trial, the court of appeals reversed, without prejudice to further efforts by the trustee to proceed against petitioners. The reversal rested on procedural grounds—petitioners' suggestions to the contrary (Pet. 12, Q. 10; Pet. App. 95) notwithstanding—unrelated to the merits of the controversy.

[5] Petitioners' assertion that "all questions propounded [by the prosecutor] were foreign to the issues involved in this criminal trial" (Pet. App. 95) is unfounded.

the only objections at trial to the use of the exhibit were based upon the claimed incompetence of the testimony sought to be elicited, not on the ground that the jury was being improperly made aware of the document's character.[8]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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PHILIP R. MONAHAN,
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MAY 1968.

[8] Petitioners also claim that there was a fatal variance between the indictment and the proof regarding the Suhl-Gibson transactions, in that, assertedly, the $50,000 Gibson check was cashed by Suhl at, rather than deposited in his account with, the Bank of America (Pet. App. 93–94). Since, however, the alleged variance affects only counts 3 and 4 and the sentences imposed on both counts against both petitioners run concurrently with the sentences on the other substantive counts (1, 2, and 5), there is no occasion to consider the contention. *United States* v. *Romano*, 382 U.S. 136, 138; *Lawn* v. *United States*, 355 U.S. 339, 359; *Hirabayashi* v. *United States*, 320 U.S. 81, 85. For the reasons stated by the court of appeals (Pet. App. 12), moreover, the contention is in any event without merit.

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